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AND
BRIEFS

Supreme Court, U.S
FILED
DEC 18 2015
OFFICE OF THE CLERK

No. 15-577

In the
Supreme Court of the United States

TRINITY LUTHERAN CHURCH OF COLUMBIA, INC.,
Petitioner,

v.

SARA PARKER PAULEY, IN HER OFFICIAL CAPACITY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF OF PETITIONERS

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CORPORATE DISCLOSURE STATEMENT

Petitioner is a nonprofit religious corporation. Petitioner does not have a parent corporation and no publicly held corporation owns any portion of any of Petitioner.

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INTRODUCTION

Respondent does not even attempt to defend the Eighth Circuit's decision under which it prevailed. Instead, Respondent distances itself from the court's reasoning by attempting to reframe the question presented as "whether states are required by the U.S. Constitution to violate their own constitutions and choose a church to receive a grant when that means turning down non-church applicants." Br. in Opp. at 3. Unfortunately, this is what the confusion and conflict over *Locke v. Davey*, 540 U.S. 712 (2004), has wrought—a State that defines neutrality as treating religious organizations worse than everyone else. This is not neutrality, but hostility to religion which violates the Free Exercise and Equal Protection Clauses.

In contrast, under Petitioner's rule, the State would not be choosing to fund a church instead of a non-church applicant. It would neutrally select scrap tire grant recipients based on *merit* without regard to religion. The grant program uses funds raised from a fee on new tires paid by religious and nonreligious citizens alike. Pet. App. 86a-88a. It funds only neutral materials—safe rubber playground surfaces. Pet. App. 90a. The criteria used to select grant recipients is completely neutral, other than the blanket exclusion of churches, including factors such as: (1) a description of the need for the project, (2) descriptions of how the rubber material

will be contained or supported, and (3) the poverty level of citizens in the surrounding area.[1]

Thus, the scrap tire program involves selection by merit alone based on completely secular and neutral criteria. Respondent wrongly states that Trinity Lutheran ranked higher "on *other* criteria" when it applied. Br. in Opp. at 2 (emphasis added). The truth is that Trinity Lutheran ranked higher on *all* secular criteria than the vast majority of other applicants. That is why the State scored its application fifth out of forty-four submissions in a year in which the State awarded fourteen grants. Pet. App. 144a. Critically, it is uncontested here that Trinity Lutheran would have received a grant but for the fact that it is a church. *See* Br. in Opp. at 2.

Respondent also wrongly asserts that awarding Trinity Lutheran a grant would benefit only those children who attend the church's programs. *See* Br. in Opp. at 5-6. This is untrue as children from the surrounding community regularly play on the church's playground. Pet. App. 133a. And the DNR scored Trinity Lutheran's application near the top of the list of applicants because of the high level of poverty in the surrounding community. *See* DNR Pub. 2425. But even if it were true, children who attend the church's programs are no less worthy of

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[1] *See* Pet. App. 91a-92a. A complete list of the criteria DNR uses to score scrap tire grant applications may be found in DNR Publication 2425, *available at* http://dnr.mo.gov/pubs/pub2425.htm (last visited Dec. 13, 2015).

protection than children who attend a secular program.

Meritorious selection is no detriment to non-church groups. In fact, even if Trinity Lutheran had been allowed to participate, thirteen out of fourteen grants would have gone to secular groups. The State scored Trinity Lutheran's application highly based solely on secular criteria but it was denied based solely on the church's religious status. Ironically, the State set up the neutral criteria, ranked Trinity Lutheran fifth highest, and now complains about the Church's ranking. In these circumstances, the State is simply exhibiting hostility to religion.

Respondent also argues that it has limited funds, so it can allocate those resources to non-church organizations. But the government cannot allocate scarce funds in a discriminatory manner. The Court rejected Respondent's argument directly in *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819 (1995). There, the Court stated that it is "incumbent on the State... to ration or allocate the scarce resources on some acceptable neutral principle." *Id.* at 835.

Fundamentally, what Respondent fails to appreciate is that Missouri's asserted interest "in achieving greater separation of church and state than is already ensured under the Establishment Clause ... is limited by the Free Exercise Clause." *Widmar v. Vincent*, 454 U.S. 263, 276 (1981).[2] The

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[2] The Court in *Widmar* addressed Missouri's no-aid provision—the same provision the DNR relied upon here to discriminate

lower courts are in conflict and confusion over when this Free Exercise limit applies. This Court should grant the Petition to resolve that question.

ARGUMENT

I. There is no government speech in this program.

Respondent proposes an exceedingly broad definition of government speech that would give it *carte blanche* authority to discriminatorily bestow any funds over which it exercises plenary control. But Respondent never raised a government speech argument below and the Eighth Circuit never advanced this rationale. Consequently, this argument is waived and cannot be raised for the first time in opposition to a petition for certiorari. *See Air Courier Conference of Am. v. Am. Postal Workers Union AFL-CIO*, 498 U.S. 517, 522 (1991) (declining to address issue raised by respondent for the first time in its brief in opposition to the petition for writ of certiorari and not encompassed within the question presented by the petition); *see also J. Truett Payne Co., Inc., v. Chrysler Motors Corp.*, 451 U.S. 557, 568 (1981) ("We do not ordinarily address for the first time in this Court an issue which the Court of Appeals has not addressed ....").

Indeed, Respondent acknowledges that "[t]he Eighth Circuit was not asked ... to answer the question of whether government speech is treated

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against Trinity Lutheran based solely on its religious status. *See Widmar*, 454 U.S. at 275-6.

differently when churches are involved." Br. in Opp. at 6. This Court should recognize Respondent's argument for what it is—a post-hoc attempt to invent a justification for the DNR's discrimination against Trinity Lutheran.

Moreover, there are good reasons to reject the government speech argument. First, recycled tires are not speech. There is no speech here at all. Providing funding for a private group to purchase scrap tire material to surface a playground is unlike funding a private group to communicate a specific government message. This Court has only characterized government benefit programs as government speech when they are designed to convey a specific governmental message. *See Legal Services Corp. v. Velazquez*, 531 U.S. 533, 541-42 (2001) (recognizing the distinction between government programs designed to convey a message the government wishes to send, and other programs not designed to convey a message).

The Court held that the program in *Velazquez* was not government speech because the government "designed th[e] program to ... accomplish its end of assisting welfare claimants in determination or receipt of their benefits." *Id.* at 542. The same is true here. The scrap tire program is designed to provide safe play areas for children, reduce the amount of scrap tires, and encourage a market for recycled scrap tires. Pet. App. 89a. The scrap tire program was never intended to convey a specific governmental message and is therefore not government speech.

Second, this Court did not hold in *Locke v. Davey* that states may single out religious groups for exclusion from general benefit programs whenever the state sees fit. Instead, the Court has held that "[i]n some cases, a funding condition can result in an unconstitutional burden on First Amendment rights." *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2328 (U.S. 2013). As this Court has recognized, "the government may not deny a benefit to a person on a basis that infringes his constitutionally protected ... freedom of speech even if he has no entitlement to that benefit.'" *United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194, 210 (2003). Nor may the State "exclude [religious adherents of any faith] because of their faith, or lack of it, from receiving the benefits of public welfare legislation." *Everson v. Bd. of Ed. of Ewing Twp.*, 330 U.S. 1, 16 (1947). For doing so would "hamper ... citizens in the free exercise of their own religion." *Id.*

Not once has this Court countenanced the rule Respondent urges, *i.e.*, to permit states to administer government benefit programs without concern for constitutional limitations. *Cf. Widmar*, 454 U.S. at 267 (recognizing that once the government establishes a benefit program it must "justify its discriminations and exclusions under applicable constitutional norms"). *Locke* certainly does not stand for that proposition.

Curiously, Respondent contends that *Locke* only applies to cases involving the "flow of public funds to schools," Br. in Opp. at 3, and plainly states that "[t]his is not such a case." *Id.* at 4. Respondent's

recognition that *Locke* does not apply here necessarily means that the Eighth Circuit's reliance on *Locke* was misplaced and its judgment in Respondent's favor groundless. That is all the more reason for this Court to grant review, as in *Locke's* absence, *Widmar's* nondiscrimination rule applies. *See* 454 U.S. at 276 ("[T]he state interest asserted here in achieving greater separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution—is limited by the Free Exercise Clause and in this case by the [Equal Protection] Clause as well.").

In *Locke*, this Court concluded that the program fell within the "play in the joints" between the religion clauses, 540 U.S. at 718-19, based on unique historical concerns related to government funding of the religious training of clergy. *Id.* at 721-22. *Locke* held that this "play in the joints" was only large enough to apply to that unique historical concern. And it certainly did not hold that "play in the joints" confers *carte blanche* authority when the government exercises "plenary control" over the funds at issue.

Yet that is the authority Respondent claims in administering the scrap tire program; the power to categorically deny a neutral secular benefit to a church solely because it is a church. And, as explained in the Petition for Certiorari, that issue has long divided the lower courts. *See* Pet. for Cert. at 13-20.

Additionally, Respondent's reliance on *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*,

135 S. Ct. 2239 (2015), is entirely misplaced. Funding for safe rubber playground surfaces has no expressive component comparable to that found in *Walker*. It does not convey a state message like a specialty license plate that functions as a "government ID[]" or a permanent government monument. *Id.* at 2249.

By excluding Trinity Lutheran, the DNR simply exhibited undifferentiated religious hostility prohibited by the Free Exercise and Equal Protection Clauses. The Eighth Circuit upheld that exclusion because of confusion surrounding the interpretation of *Locke*, a case which Respondent concedes does not apply here. This Court should grant the Petition to clarify that *Locke v. Davey* does not confer on states a general authority to exclude religious groups from neutral government benefit programs.

II. The lower courts are in conflict regarding the proper interpretation of *Locke*.

Respondent attempts to avoid the lower court conflict concerning *Locke* by placing an artificial limit on their scope, *i.e.*, by arguing that they involve funding decisions made by private choice and not by government decision. *See* Br. in Opp. at 3-4. However, that is a distinction without a difference. It is true that the program in *Locke* involved "the independent and private choice of recipients." 540 U.S. at 719.

But, as explained in the Petition for Certiorari, private choice is not the only way to include religion

and comply with the Establishment Clause. *See* Pet. for Cert. at 26-27. This Court has upheld government programs that provide direct funding to religion where there was no private choice, but the aid involved had no religious content and furthering religious activities was either non-existent or *de minimis*. *See* Pet. for Cert. at 26-27 (citing cases). Here, Trinity Lutheran is not asking for a grant to buy prayer books, but simply to have its application for a safe rubber playground surface for children judged on the same neutral criteria as other nonprofit daycares.

There is no doubt that Missouri could include churches in the scrap tire program without violating the Establishment Clause. Even the Eighth Circuit agreed with this proposition. *See* Pet. App. at 9a. The question is whether Respondent is prohibited by the Free Exercise and Equal Protection Clauses from categorically excluding churches from the scrap tire program. The resolution of that question turns on the interpretation of *Locke*. Are the lower courts, like the First and Eighth Circuits and the Colorado Supreme Court, correct that religion may be categorically excluded from an otherwise neutral grant program, or are the lower courts, like the Seventh and Tenth Circuits, correct that *Locke* does not allow for such categorical religious discrimination? Only this Court may resolve this question and it should grant the Petition to do so.

Respondent also relies on dicta in *Badger Catholic, Inc. v. Walsh*, 620 F.3d 775 (7th Cir. 2010), to say that selective funding by the government is permissible unless the government creates a public

forum. *See* Br. in Opp. at 7-8. However, the only example cited for this proposition in *Badger Catholic* was this Court's opinion in *Locke*. And the *Badger Catholic* opinion noted the limits of *Locke*; that it did not apply in instances where, as here, the program evinces hostility to religion or where the funds were distributed as part of a public forum. *Id.* at 780. Nowhere did *Badger Catholic* suggest that a state can engage in selective funding when it retains plenary control over the distribution of funds, as the student government did in that case.

All Respondent has done is to highlight the confusion that reigns in lower courts about the proper interpretation and application of *Locke*. That is precisely why this Court should grant review.

III. This case does presage the denial of numerous benefits to churches.

Respondent admits in surprising candor that Trinity Lutheran's assertion that the Eighth Circuit opinion would allow for the denial of basic services to churches, such as police and fire protection, "could move closer to the mark." Br. in Opp. at 9. Respondent never denies that this is the logical conclusion of the Eighth Circuit's opinion. Misreading *Locke* as justifying the categorical exclusion of churches from otherwise neutral government benefit programs leads ineluctably to the conclusion that a state may choose to apply that rule in numerous other contexts, including the provision of basic services.

Indeed, as *amici* ably demonstrate, the Eighth

Circuit's opinion may lead to the categorical exclusion of churches from all kinds of neutral government benefits, including:

> vouchers and scholarships for schools; subsidies for textbooks and school transportation; tax credits for scholarships; grants for construction projects; funding for rehabilitation centers; and subsidies for resurfacing playgrounds with rubber made from recycled tire scrap, like the Missouri program at issue here.

Amicus Br. of Ass'n of Christian Sch. Int'l & Lutheran Church—Missouri Synod at 16-24; *see also* Amicus Br. of Ethics & Religious Liberty Comm'n at 11-14. It is certainly not "farfetched" to believe that blanket religious exclusions, such as the one the DNR instituted in this case, if given constitutional sanction, will perpetuate in numerous contexts.

IV. Respondent does not deny that Article I, Section 7 of the Missouri Constitution was born of religious bigotry.

Respondent engages in a linguistic shell game by arguing that the 1945 Missouri Constitution and the record of the debates surrounding that constitution do not suggest religious animus. *See* Br. in Opp. at 10. Yet, tellingly, Respondent does not deny that the no-aid provision was steeped in religious bigotry at the time of its enactment.[3] All

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[3] The history of anti-Catholicism in Missouri was explained and documented in the Amicus Brief of the Becket Fund for

Locke requires is a "credible connection" between the Blaine Amendment and Article I, Section 7. *See* 540 U.S. at 723 n.7. As explained in the Petition, there is such a credible connection that even Respondent does not deny.

Respondent simply claims that the 1945 Missouri Constitution chose to retain the no-aid provision and that this intervening decision cures the religious bigotry underlying its original enactment in 1875. However, Respondent admits that there was only a "brief discussion at the [1943-44] constitutional convention about the no-aid provision." Br. in Opp. at 11. Merely choosing to keep a discriminatory provision with nary a debate hardly wipes the slate clean. This Court recognized as much in *Hunter v. Underwood*, 471 U.S. 222 (1985), where the Court struck down a state constitutional provision disenfranchising persons convicted of crimes involving moral turpitude.

In *Hunter*, the State of Alabama tried to argue that, despite the original discriminatory purpose of the provision, "events occurring in the succeeding 80 years had legitimated the provision." *Id.* at 232-33. This Court strongly rejected that argument: "[W]e simply observe that its original enactment was motivated by a desire to discriminate against blacks on account of race and the section continues to this day to have that effect." *Id.* at 233.

The same is true of the Missouri no-aid

Religious Liberty below. *See* Amicus Br. of Becket Fund, 8th Cir. Case No. 14-1382, at 6-16.

provision here. It was born of religious bigotry and it continues to discriminate against religious organizations today.

V. The Circuit Courts are in conflict over Equal Protection analysis in cases that also involve Free Exercise claims.

Respondent attempts to minimize the conflict in the lower courts on the appropriate level of scrutiny to apply in cases presenting an equal protection claim involving religion. Yet one cannot simply ignore, as Respondent does, the Tenth Circuit's statement that:

> [W]e conclude that statutes involving discrimination on the basis of religion, including interdenominational discrimination, are subject to heightened scrutiny whether they arise under the Free Exercise Clause, the Establishment Clause, or the Equal Protection Clause ...."

Colorado Christian Univ. v. Weaver, 534 F.3d 1245, 1266 (10th Cir. 2008) (citations omitted).

That general proposition, taken from this Court's precedents, squarely conflicts with the Eighth Circuit's decision to apply rational basis review here based on *Locke*. This Court should grant review to resolve the conflict in the lower courts regarding the appropriate level of scrutiny that applies under the Equal Protection Clause when a state denies a religious organization equal treatment based solely on its religious status.

CONCLUSION

For the foregoing reasons, as well as those stated in the Petition, this Court should grant review.

Respectfully submitted,

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December 18, 2015